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No. 09-1

Supreme Court, U.S.
FILED
OCT 27 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

HOLY SEE,
Petitioner,
v.
JOHN V. DOE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Contrary to Respondent's argument in the brief in opposition, the Ninth Circuit's decision conflicts with prior holdings of this Court and circuit courts on four major issues: the use of precursor conduct to find jurisdiction under the FSIA, the use of a "direct outgrowth" theory to confer jurisdiction under the tort exception, the stripping of immunity in the absence of a jurisdictionally-significant act attributable to the foreign sovereign, and the reliance on state liability rules contrary to the FSIA's federal jurisdictional requirements.

Respondent's brief also ignores that the Ninth Circuit's decision undermines basic principles undergirding foreign sovereign immunity, including uniformity, comity, equality and reciprocity.

Because the Ninth Circuit's decision creates multiple conflicts and undermines core principles of foreign sovereign immunity, certiorari should be granted. In the alternative, given the nature of the issues and the foreign policy implications of this case, the Court should request the views of the Solicitor General and then grant the petition.

I. CONTRARY TO RESPONDENT'S ASSERTION, THE NINTH CIRCUIT'S DECISION CREATES A NUMBER OF CONFLICTS

a. Use of Precursor Conduct Under the FSIA: Respondent concedes that the Ninth Circuit relied on precursor conduct occurring within the scope of employment to find jurisdiction over Respondent's

vicarious liability claim under the FSIA's tort exception. Brief in Opposition ("Opp.") 10-11. The Ninth Circuit's decision to base FSIA jurisdiction on conduct occurring before the jurisdictionally-significant act is contrary to the holdings of this Court and the circuit courts. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 358 (1993) (rejecting theory of jurisdiction based upon "activities that preceded [the torts'] commission"); *see also id.* at 363; *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (rejecting "unexpressed" jurisdictional requirements under the FSIA);[1] *Gerding v. Republic of France*, 943 F.2d 521, 527 (4th Cir. 1991); *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513 (D.C. Cir. 1988); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524-25 (D.C. Cir. 1984); Petition for a Writ of Certiorari ("Pet.") 19-20.

b. **Use of "Direct Outgrowth" Theory Under Tort Exception:** Respondent also acknowledges that the Ninth Circuit relied upon a "direct outgrowth" theory of jurisdiction. Opp. 10-11. The Ninth Circuit's "direct outgrowth" approach conflicts with *Amerada Hess* and circuit precedent. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 (1989) (rejecting "direct effect" approach under tort exception); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir. 1984); *see also Weltover*, 504 U.S. at 618; Pet. 18-19.

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[1] While *Nelson*, *Weltover* and *Amerada Hess* each obviously involved their own set of facts, Opp. 13-14, Respondent never explains how the Ninth Circuit's decision is consistent with the principles set forth in this Court's prior holdings.

c. **Absence of Jurisdictionally-Significant Attributable Act:** By finding jurisdiction notwithstanding that the tortious act itself fell outside the scope of employment, the Ninth Circuit's opinion conflicts with precedent requiring jurisdictionally-significant acts to be attributable to the foreign sovereign itself. *Cf.*, *e.g.*, *Dale v. Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006); *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 400 (4th Cir. 2004); *Zappia Middle E. Const. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 252 (2d Cir. 2000); Pet. 15-16.[2]

d. **Use of State Law as Against Contrary Federal Jurisdictional Requirements:** The Ninth Circuit's unbridled use of state liability rules is inconsistent with FSIA precedent, where circuit courts have applied state law without exceeding the parameters of the federal jurisdictional statute. *See*, *e.g.*, *O'Bryan v. Holy See*, 556 F.3d 361, 385 (6th Cir. 2009), *cert. denied*, 77 U.S.L.W. 3645 (U.S. Oct. 5, 2009) (No. 08-1384) (holding that the tortious act of

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[2] The tortious act of sexual abuse is "clearly" outside the scope of a priest's employment. *Fearing v. Bucher*, 977 P.2d 1163, 1166 (Or. 1999); Pet. 12-13; *see also* Opp. 5-6 (conceding that "the sexual act itself may not be within the 'scope of employment[]'" under Oregon law). Nothing in *Minnis* – wherein the court and the parties all *agreed* that the sexual assault was outside the scope of employment – suggests otherwise. *Minnis v. Oregon Mut. Ins. Co.*, 48 P.3d 137, 143 (Or. 2002); Pet. 13 n.4; Opp. 9-10. Moreover, Ronan's conduct of acting as Respondent's "priest, counselor and spiritual adviser" (Pet. App. 34a) was not "tortious," Opp. 11, since it could not have subjected Ronan to liability. RESTATEMENT (SECOND) OF TORTS § 6 (1965); *see also Schmidt v. Archdiocese of Portland*, 180 P.3d 160, 178 (Or. App. 2008) (vicarious liability under Oregon law "based on an employee's actions . . . *preceding his tortious conduct*") (emphasis added).

sexual abuse fell outside the tort exception's scope-of-employment requirement under Kentucky law); *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 173-74 (5th Cir. 1994) (holding that negligent driving during trip taken for personal reasons fell outside the tort exception's scope-of-employment requirement under Mississippi law); *Robinson v. Gov't of Malaysia*, 269 F.3d 133, 142-46 (2d Cir. 2001) (determining that state law claims do not satisfy tort exception's "tortious act or omission" requirement).

FTCA precedent – which Respondent concedes is directly applicable and yet largely fails to address (Opp. 16-18)[3] – precludes the application of a state liability rule that conflicts with the limitations imposed by the federal jurisdictional statute. *Dalehite v. United States*, 346 U.S. 15, 45 (1953); *Laird v. Nelms*, 406 U.S. 797, 798-99 (1972); *see also* Pet. 25-26. Both *Dalehite* and *Laird* require the application of the "uniform federal limitation . . . . *[r]egardless of state law characterization.*" *Laird*, 406 U.S. at 799. Circuit courts have long applied that rule with respect to section 1346(b)'s scope-of-employment requirement. *See Primeaux*, 181 F.3d at 878; *Pierson v. United States*, 527 F.2d 459, 464 (9th Cir. 1975); *Rodriguez v. United States*, 455 F.2d 940, 942 (1st Cir. 1972); *United States v. Taylor*, 236 F.2d 649, 653 (6th Cir.

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[3] Although Respondent cites a host of FTCA cases, Opp. 17-18, the opposition notably cites only a single case that addresses whether jurisdiction can lie based upon a state liability rule that extends beyond the FTCA's scope-of-employment requirement. That case – *Primeaux v. United States*, 181 F.3d 876 (8th Cir. 1999) (en banc) – *rejected* application of the state liability rule, precisely the result that the Holy See urges here.

1956);[4] *see also Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995); *FDIC v. Meyer*, 510 U.S. 471, 477 (1994); *Sheridan v. United States*, 487 U.S. 392, 401 (1988); Pet. 26-27.

In short, contrary to Respondent's assertion, the Ninth Circuit's decision creates conflicts in areas at the heart of FSIA jurisprudence.

II. THE NINTH CIRCUIT'S DECISION UNDERMINES CORE PRINCIPLES OF FOREIGN SOVEREIGN IMMUNITY IGNORED BY RESPONDENT

In addition to creating a number of conflicts, the Ninth Circuit's decision undermines core principles of foreign sovereign immunity, including uniformity, comity, equality and reciprocity. The profound implications of the Ninth Circuit's opinion – ignored in Respondent's opposition – warrant this Court's review.

a. Uniformity: The Ninth Circuit's decision vitiates the FSIA's uniformity, a consequence that Respondent's opposition brief ignores. *See* Opp. *passim*; *cf.* Pet. 28-29.

Prior to the enactment of the FSIA, "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes

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[4] Given that Congress modeled the tort exception on the FTCA, Congress may be presumed to have had knowledge of the prior interpretations of section 1346(b) and intended the FSIA to be interpreted consistently with FTCA precedent. *Bragdon v. Abbott*, 524 U.S. 624, 631, 645 (1998); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487-88 (1983) (citations omitted). Recognizing that "'a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences[,]'" Congress "acted to bring order to this legal uncertainty" and created uniform standards to resolve foreign sovereign immunity issues. *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004) (Kennedy, J., dissenting) (quoting H.R. REP. NO. 94-1487, at 13 (1976)); *see also, e.g.*, H.R. REP. NO. 94-1487, at 32 (discussing "the importance of developing a uniform body of law in this area"). Congress intended the FSIA to "reduc[e] the potential for a multiplicity of conflicting results among the courts of the 50 states." *Verlinden*, 461 U.S. at 497; *see also First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964)) ("matters bearing on the nation's foreign relations 'should not be left to divergent and perhaps parochial state interpretations.'").

The Ninth Circuit's decision creates the "multiplicity of conflicting results" that the FSIA was intended to eliminate. The conflicting results emerge not because of a failure to apply "federal common law," which, contrary to Respondent's contention, the Holy See nowhere urged in its petition. *See* Opp. 14; *cf.* Pet. *passim*. Rather, conflicting results exist because the Ninth Circuit failed to apply the "detailed federal law standards set forth in the Act[,]" *Verlinden*, 461 U.S. at 494, namely the requirement that the tortious act

itself be within the scope of employment. 28 U.S.C. 1605(a)(5).

The conflicting results are already manifest. Under both Oregon and Kentucky law, sexual abuse of a child is outside the scope of a priest's employment. *Fearing*, 977 P.2d at 1166; *O'Bryan*, 556 F.3d at 385. Yet because the Ninth Circuit refused to apply the federal legal standard set forth in the tort exception and instead applied the "necessary precursor"/"direct outgrowth" approach to jurisdiction, the Ninth Circuit and the Sixth Circuit reached opposite results under the FSIA with regard to identical claims. *Compare* Pet. App. 33a-35a (panel decision) *with O'Bryan*, 556 F.3d at 385. The conflict between the Ninth Circuit and the Sixth Circuit is what can be expected when federal courts permit state liability rules to drive the jurisdictional inquiry in a manner untethered from the standards set forth in the FSIA's exceptions.

The Ninth Circuit's approach also violated section 1606, which provides that "*[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605* . . . , the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. 1606 (emphasis added); *see also Verlinden*, 461 U.S. at 488-89; Pet. 22-23; *cf.* 28 U.S.C. 1346(b) (incorporating liability standard into jurisdictional inquiry); Pet. 24-25. Beyond repeatedly excising the conditional clause of section 1606, Respondent proffers no explanation as to how the Ninth Circuit's unbridled use of Oregon's vicarious liability rule in the immunity determination itself is consistent with section 1606's plain language. *See* Opp. 7-8; *see also United States v. Menasche*, 348 U.S. 528,

538-39 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)) ("It is our duty 'to give effect, if possible, to every clause and word of a statute[.]'").

Federal subject matter jurisdiction under the FSIA must depend upon the uniform and comprehensive standards set forth in the Act – here, the requirement that the tortious act be within the scope of employment – and not on the capacity of state courts and the plaintiffs' bar to develop new theories of liability. *Cf.* Opp. 3-5 (arguing that Oregon's liability rule is justifiable "[i]n light of contemporary knowledge of the dynamics of childhood sexual abuse"). Because the Ninth Circuit's decision profoundly undermines the FSIA's uniformity, certiorari should be granted.

b. **Comity and Equality**: By failing to apply FTCA precedent, the Ninth Circuit's decision flouts international comity. Pet. 26 n.7; *see also Verlinden*, 461 U.S. at 486; *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2190 (2008).

The Ninth Circuit's failure to apply FTCA precedent is also contrary to the basic principle of equality underlying foreign sovereign immunity. *The Schooner Exchange v. McFaddon*, 7 Cranch 116, 136 (1812); *Pimentel*, 128 S. Ct. at 2190. Consistent with the equality principle, many of the FSIA's provisions – including the tort exception – were intended to "place[] the foreign sovereign in a position similar to the domestic sovereign." von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 45 (1978); Belman, *New Departures in the Law of Sovereign Immunity*, 63 AM. SOC'Y INT'L L. PROC. 182, 185, 195 (1969); *see also* H.R. REP. NO. 94-1487, at 21 (tort exception exclusions); *id.* at 25-26

(default judgments); *id.* at 13, 33 (jury trials); *id.* at 21 (maritime exception); *id.* at 25 (time to respond); *id.* at 31 (venue). By treating foreign sovereigns in the manner the U.S. government is treated under federal law, the FSIA "echoe[d] the theme of equality of treatment which has been present for some time in consideration of the foreign sovereign immunity problem." von Mehren, *supra*, at 45; *see also* Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 226, 229 (1951); Comment, *The Jurisdictional Immunity of Foreign Sovereigns*, 63 YALE L.J. 1148, 1165 (1954). By failing to apply FTCA precedent here, the Ninth Circuit opinion undermines the equality principle underlying the FSIA.

c. **Reciprocity:** Foreign sovereign immunity derives in part from "'fair dealing'" and "'reciprocal self-interest.'" *Pimentel*, 128 S. Ct. at 2190 (quoting *Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 362 (1955)); *see also* Pet. 16-17. By stripping immunity absent a jurisdictionally-significant act that is attributable to the foreign sovereign, the Ninth Circuit's decision marks a radical departure from domestic and international foreign sovereign immunity law. Pet. 15-16; *see also, e.g.*, United Nations Convention on Jurisdictional Immunities of States and Their Property arts. 10-17, *adopted* Dec. 2, 2004, http://untreaty.un.org/English/notpubl/English_3_13.pdf (last visited Oct. 26, 2009) (action or activity by the foreign state, or attributable to the foreign state, required under exceptions to immunity). Such an unprecedented expansion of jurisdiction – which raises the specter that jurisdiction could be found against the U.S. government in foreign courts even in the absence of jurisdictionally-significant attributable conduct –

must be avoided by the federal courts. *See* Feldman, *The United States Foreign Sovereign Immunities Act of 1976: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 302-03 (1986) ("the elaboration of principles of foreign sovereign immunity by national authorities is a viable process only if practised with restraint so that the result commands a sufficient consensus to make the [international] system workable.").

The Ninth Circuit's creation of an expansive "necessary precursor"/"direct outgrowth" approach to jurisdiction also undercuts the principle of reciprocity. Foreign sovereign immunity is an area of growing national and international codification. *See* United Nations Convention on Jurisdictional Immunities of States and Their Property; *see also* State Immunity Act, 1978, c.33 (U.K.); Foreign States Immunities Act, 1985 (Austl.); State Immunity Act, 1985, c. S-18 (Can.); State Immunity Ordinance, 1981 (Pak.); Immunidad Jurisdiccional de los Estados Extranjeros ante los Tribunales Argentinos, Law No. 24.488, May 31, 1995 (Arg.); State Immunity Act, 1985, c.313 (Sing.); Foreign States Immunities Act 87 of 1981 (S. Afr.).[5] Reliance on jurisdictional bases not provided by the United States' foreign sovereign immunity statute creates uncertainty as to the scope of foreign sovereign immunity in the U.S. and abroad.

Because the Ninth Circuit's decision undermines core principles of uniformity, comity, equality and reciprocity, and thereby adds "prospective instability

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[5] The referenced statutes are reproduced in STATE IMMUNITY: SELECTED MATERIALS AND COMMENTARY 329-522 (Dickinson *et al.* eds., 2004).

to the most sensitive area of foreign relations[,]" *Altmann*, 541 U.S. at 715 (Kennedy, J., dissenting), certiorari should be granted.

III. RESPONDENT'S PROCEDURAL POSTURE ARGUMENT IS MOOTED BY THE DISTRICT COURT'S RECENT ORDER DENYING LEAVE TO AMEND

Respondent argues that "the case is currently in a procedural posture that counsels against this Court's review" because Respondent recently filed a motion in the district court for leave to amend the complaint. Opp. 12, 19-20. Respondent's point is now moot, since the district court denied Respondent's motion for leave to amend on October 20, 2009.

There is nothing unusual about the procedural posture of this case. The Court has repeatedly granted certiorari in FSIA cases involving challenges on the face of the complaint. *See Altmann*, 541 U.S. at 681; *Nelson*, 507 U.S. at 352. Indeed, that is the very purpose of the collateral order doctrine – to permit presumptively-immune parties to receive the earliest possible resolution of immunity issues in order to avoid the burdens of litigation. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 524-29 (1985); *United States v. Moats*, 961 F.2d 1198, 1203 (5th Cir. 1992) (stating that foreign sovereign immunity "is an immunity from the burdens of becoming involved in any part of the litigation process, from pre-trial wrangling to trial itself").

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted. Alternatively, the Court should call for the views of the Solicitor General and then grant the petition.

Respectfully submitted,

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October 2009